

UNITED STATES OF AMERICA  
U.S. DEPARTMENT OF HOMELAND SECURITY  
UNITED STATES COAST GUARD

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**UNITED STATES COAST GUARD**

Complainant

vs.

**THOMAS TIMOTHY McCANN**

Respondent.

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Docket Number: CG S&R 07- 0113  
CG Case No. 2882207

**ORDER**

**Issued by: Walter J. Brudzinski, Administrative Law Judge**

**Issued: May 11, 2007**

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This Order is issued in accordance with 33 CFR Sections 20.710, 20.901, and 20.902(c) in that the parties waived submission of post-hearing proposed findings at a suspension and revocation conducted on May 8, 2007 in Toledo, Ohio and the undersigned issued findings, conclusions, and sanction at the conclusion of the proceedings. Having found that the Respondent and the subject matter of this hearing within the jurisdiction vested in the Coast Guard under 46 U.S.C. § 7703 and 46 CFR 5.27, I found that the Coast Guard proved the allegations in the Complaint by the preponderance of reliable, probative, and substantial evidence and revoked Respondent's document at the close of the hearing at which time Respondent's license was surrendered to the Coast Guard Investigating Officer.

### Complaint

On March 12, 2007, the Coast Guard Investigating Officer, LTJG Joseph R. Reinhart, USCG, issued a one count Complaint of Misconduct as follows:

1. On September 09, 2005, Newport Alliance Drug Consortium issued a random drug test notification letter to respondent.
2. Respondent failed to take the random drug test.
3. On October 04, 2005, Newport Alliance Drug Consortium issued a failure to test notification letter to respondent.
4. On November 07, 2005, Newport Alliance Drug Consortium issued a final failure to test notification letter to respondent.
5. On May 05, 2006, Newport Alliance Drug Consortium issued a random drug test notification letter to respondent.
6. Respondent failed to take the random drug test.
7. On June 19, 2006, Newport Alliance Drug Consortium, issued a failure to test notification letter to respondent.

The Coast Guard proposed Revocation.

### Procedure

The Respondent timely filed his Answer admitting to the jurisdictional allegations and denying the factual allegations contained in the Complaint's paragraphs 1 through 4. Respondent raised "lack of organization" as an affirmative defense and requested a hearing. The Coast Guard proposed May 8, 2007 as one of the dates for hearing and the Respondent agreed. Therefore, the undersigned issued a Scheduling Order setting the hearing for May 8, 2007, in Toledo, Ohio.

### Hearing

At the hearing, the Coast Guard presented the testimony of two witnesses: Ms. Lori Arruda, the Newport Alliance Program Coordinator who manages the Respondent's drug program, and the Respondent, Thomas Timothy McCann.<sup>1</sup> The Coast Guard also introduced 8 exhibits. The Respondent presented his own testimony and introduced no exhibits.

Ms. Arruda explained the Consortium's procedures to randomly select people for drug testing. She verified that Respondent's name was among those selected on those occasions listed in the Complaint and verified that the letters alluded to in the Complaint were sent to the Respondent. She also authenticated Coast Guard Exhibits 1 through 8. Finally, she testified that Respondent did not take the required chemical tests for dangerous drugs.

Respondent testified that he did not open the initial notification letters until after the time selected for him to participate in the random test. He testified that he was busy with other matters associated with running his business and that he is basically disorganized. He does not deny receiving the notification letters; just that he did not take timely action on them. He also testified that he did not show up to take the required chemical test for dangerous drugs as alleged in paragraph 2.

Concerning the notification on May 5, 2006, Respondent testified that he did receive that letter. However, when he showed up at the collection site, he was not permitted to provide a sample because he did not have a picture identification card with him. He testified further that he was too busy to obtain a picture ID and return to the lab as required.

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<sup>1</sup> As per Respondent's testimony, he is also known as Timothy Thomas McCann

Respondent stated that he offered to take a test on subsequent occasions but was refused the opportunity to do so. He also stated that he does not use dangerous drugs. I reminded Respondent that there is no evidence that he is a user of dangerous drugs and that these proceedings are simply to determine whether he refused to take a required chemical test.

#### Law

The Coast Guard cites 46 U.S.C. §7703(1)(B) and 46 CFR 5.27 as authority. Title 46 U.S.C. § 7703 reads as follows:

#### **Bases for suspension or revocation**

A license, certificate of registry, or merchant mariner's document issued by the Secretary may be suspended or revoked if the holder-

- (1) when acting under the authority of that license, certificate, or document--
  - (A) has violated or fails to comply with this subtitle, a regulation prescribed under this subtitle, or any other law or regulation intended to promote marine safety or to protect navigable waters;
  - or
  - (B) has committed an act of misconduct or negligence;
- (2) is convicted of an offense that would prevent the issuance or renewal of a license, certificate of registry, or merchant mariner's document;
- (3) within the 3-year period preceding the initiation of the suspension or revocation proceeding is convicted of an offense described in section 30304(a)(3)(A) or (B) of title 49;
- (4) has committed an act of incompetence relating to the operation of a vessel; or
- (5) is a security risk that poses a threat to the safety or security of a vessel or a public or commercial structure located within or adjacent to the marine environment.

Title 46 CFR 5.27 reads as follows:

**§ 5.27 Misconduct.**

Misconduct is human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources. It is an act which is forbidden or a failure to do that which is required.

Respondent was required to take a mandatory chemical test for dangerous drugs under 46 CFR Part 16 and 49 CFR Part 40. He failed to do so. Therefore, he failed to do that which is required.

Title 46 CFR 5.57 reads as follows:

**§ 5.57 Acting under authority of license, certification, or document.**

- (a) A person employed in the service of a vessel is considered to be acting under the authority of a license, certificate or document when the holding of such license, certificate or document is:
  - (1) Required by law or regulation; or
  - (2) Required by an employer as a condition for employment.
- (b) A person is considered to be acting under the authority of the license, certificate or document while engaged in official matters regarding the license, certificate or document. This includes, but is not limited to, such acts as applying for renewal of a license, taking examination for upgrading or endorsement, requesting duplicate or replacement licenses, certificates or documents, or when appearing at a hearing under this part.
- (c) A person does not cease to act under the authority of a license, certificate or document while on authorized or unauthorized shore leave from the vessel.

As s licensed merchant mariner, Respondent is subject to mandatory chemical drug testing pursuant to 46 CFR Part 16 and 49 CFR Part 40. Mandatory chemical drug testing, among other things, is considered an official matter regarding a license, certificate, or document. Therefore, the Respondent was acting under the authority of his license at all times relevant.

#### Decision

At the end of the hearing, I inquired of the parties whether they wished to submit post hearing proposed findings as provided for under 5 U.S.C. § 557(c ) and 33 CFR 20.710(b). I also advised that I was prepared to announce my findings, conclusions, and sanction from the bench to be followed by a written order. The parties waived submission of proposed findings and indicated their desire to have the decision and sanction rendered from the bench. I announced that I found the allegations contained in the complaint proved by the preponderance of reliable, probative, and substantial evidence.

#### Sanction

In announcing the Sanction, I found that the Table at 46 CFR 5.569 entitled “Suggested Range of an Appropriate Order” provided a range from 12 to 24 months for “Refusal to take chemical drug test.” Ignoring the initial notification letter and the subsequent failure to test letters places this Respondent at the upper end of the 12 to 24 month suspension range. However, Respondent also refused to test on the May 5, 2006 notification by failing to return to the test site with a photo ID.

Under 46 CFR § 5.569(d) “[m]itigating or aggravating factors may make an order greater or less than the given range appropriate. Orders for repeat offenders will ordinarily be greater than those specified.” Under Commandant v. Moore, NTSB Order No. EM-201 (2005),

aggravating factors that would justify going beyond the sanction range listed in Table 5.569 must be separately listed or articulated. Therefore, in announcing the Sanction, I listed the following as an **Aggravating Factor**: Having previously failed to respond to the initial notification and two, subsequent failure to test notification letters on the first chemical test for dangerous drugs, Respondent was again notified on May 5, 2006 to take a second chemical test for dangerous drugs. Respondent showed up at the test site but was refused because he could not produce a photo ID. He subsequently failed to return to the test site with a photo ID as he was obligated to do. Therefore, he is found to have refused a chemical test for dangerous drugs twice. As such, he is a repeat offender, having been given chance after chance to take the first test. Respondent's claim of being preoccupied with the day to day tasks associated with running his business coupled with his claim of disorganization cannot be accepted as an excuse or mitigating factors for failure to comply with the law.

WHEREFORE,

**ORDER**


**IT IS HEREBY ORDERED** that the allegations in the Complaint dated March 12, 2007 are found **PROVED**.

**IT IS FURTHER ORDERED** that Respondent's Merchant Mariner's license is **REVOKED**.

**IT IS FURTHER ORDERED** that service of this Decision on the parties and/or parties' representative(s) serves as notice of appeal rights set forth in 33 CFR 20.1001 – 20.1004. (**Attachment A**).

**IT IS FURTHER ORDERED** that since the undersigned previously announced findings and sanction at the close of hearing on May 8, 2007, the 30 day time period for the parties to file notice of appeal pursuant to 33 CFR 20.1001(a) commences Tuesday, May 15, 2007.

Done and dated May 11, 2007  
New York, New York

  
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**WALTER J. BRUDZINSKI**  
**ADMINISTRATIVE LAW JUDGE**  
**U.S. COAST GUARD**



## ATTACHMENT A

### NOTICE OF APPEAL RIGHTS

#### **33 CFR 20.1001 General.**

- (a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.
- (b) No party may appeal except on the following issues:
  - (1) Whether each finding of fact is supported by substantial evidence.
  - (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
  - (3) Whether the ALJ abused his or her discretion.
  - (4) The ALJ's denial of a motion for disqualification.
- (c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.
- (d) The appeal must follow the procedural requirements of this subpart.

#### **33 CFR 20.1002 Records on appeal.**

- (a) The record of the proceeding constitutes the record for decision on appeal.
- (b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --
  - (1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,
  - (2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

#### **33 CFR 20.1003 Procedures for appeal.**

- (a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.
  - (1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --

- (i) Basis for the appeal;
  - (ii) Reasons supporting the appeal; and
  - (iii) Relief requested in the appeal.
- (2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.
- (3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.
- (b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.
- (c) No party may file more than one appellate brief or reply brief, unless --
- (1) The party has petitioned the Commandant in writing; and
  - (2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.
- (d) The Commandant may accept an *amicus curiae* brief from any person in an appeal of an ALJ's decision.

**33 CFR 20.1004 Decisions on appeal.**

- (a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.
- (b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.

**ATTACHMENT B**

**WITNESS AND EXHIBIT LISTS**

WITNESS LIST

COAST GUARD'S WITNESSES

1. Lori Arruda, Newport Alliance Program Coordinator
2. Thomas Timothy McCann, Respondent

RESPONDENT'S WITNESSES

1. Thomas Timothy McCann

EXHIBIT LIST

COAST GUARD'S EXHIBITS

- CG Ex. 1 – Letter form Newport Alliance to the Coast Guard dated March 8, 2007
- CG Ex. 2 – Newport Alliance Randomization Program
- CG Ex. 3 – Newport Alliance 2005 Random Drug testing pool schedule
- CG Ex. 4 – Newport Alliance 2006 Random drug testing pool schedule
- CG Ex. 5 – Newport Alliance and Fisherman's Warf contract agreement for 2005-2006
- CG Ex. 6 – Newport Alliance and Fisherman's Warf contract agreement for 2006-2007
- CG Ex. 7 – Newport Alliance Random Selection list from September 9, 2005
- CG Ex. 8 – Newport Alliance Random Selection list from May 31, 2006

RESPONDENT'S EXHIBITS

None